ECORD
AND
RIEFS

No. 16-1161

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IN THE

Supreme Court of the United States

BEVERLY R. GILL, *et al.*,

Appellants,

v.

WILLIAM WHITFORD, *et al.*,

Appellees.

On Appeal from the United States District Court of the Western District of Wisconsin

BRIEF OF PROFESSOR D. THEODORE RAVE AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*

Amicus curiae D. Theodore Rave is an Assistant Professor of Law at the University of Houston Law Center. He is an expert in the areas of election law and public fiduciary law. *Amicus* has an interest in the proper interpretation of the constitutional limitations on legislative redistricting and their effects on governance. *Amicus* believes that the U.S. Constitution prohibits incumbent state legislators from manipulating district lines to entrench themselves in power and that this Court is the only institution that can provide a remedy.[1]

SUMMARY OF ARGUMENT

As this Court, the Framers, and foundational political theory have recognized, elected officials, such as legislators, are fiduciaries who have a duty to loyally serve the interests of the people they represent, not their own interests. This commitment to fiduciary government is embedded deep in the constitutional structure. When fiduciaries act in the face of a conflict of interest—like by drawing the

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[1] All parties have submitted letters granting blanket consent to *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The law school employing *amicus* provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs in preparing this brief. Otherwise, no person or entity has made a monetary contribution intended to fund the preparation or submission of this brief.

electoral districts in which they will run for reelection—they bear the burden of showing that their actions are fair and in the best interest of those they represent.

Appellants did not meet that burden here. As the district court found, Appellants acted with the intent to entrench themselves, benefit their political allies, and frustrate potential challengers when they drew electoral districts for the Wisconsin legislature. And the maps they drew had that effect. As Appellees and their *amici* have shown, the Wisconsin legislature acted unconstitutionally in gerrymandering its own districts.

In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), several members of this Court raised legitimate concerns about whether the federal courts are well suited to police such an inherently political process. But reaffirming the justiciability of political gerrymandering claims and affirming the district court in this case will not inevitably involve the federal courts in supervising every redistricting decision. The purpose of this brief is to explain how the Court can create incentives for state legislatures to adopt independent redistricting processes to which the federal courts can safely defer.

Courts are no better at reviewing business judgments than political ones. But when faced with the analogous problem of self-dealing directors in corporate law, courts do not just throw up their hands and declare the whole matter nonjusticiable. Instead, corporate law creates a two-track system of judicial review. Decisions made by conflicted

fiduciaries are subjected to exacting scrutiny, but corporate law creates a safe harbor for decisions made or ratified through independent processes. When conflicted directors run their decisions through an independent process, the taint of self-dealing is cleansed, and reviewing courts can safely defer to the substantive outcome so long as they ensure that the process was independent.

Finding an unconstitutional political gerrymander in this case will not plunge the federal courts into the political thicket if this Court creates a safe harbor for redistricting decisions made through independent processes, like the independent redistricting commissions in Arizona and California. Instead, the threat of litigation and skeptical judicial review of districts drawn by conflicted state legislatures will create a powerful incentive for those legislatures to adopt independent processes to engage in the complex and delicate task of redistricting without the overwhelming temptation to manipulate district lines to their own advantage. Courts can safely defer to the substantive redistricting decisions of these institutions and confine their review to ensuring that the process was fair and independent—a task for which courts are well suited.

ARGUMENT

I. This Court Should Be Skeptical Of Districts Drawn By Incumbents And Should Subject Them To Searching Review.

Appellants' *amici* argue that a redistricting plan is, like any ordinary act of a state legislature, entitled

to a presumption of constitutionality and deferential rational basis review. *See* State of Texas et al. Amici Br. 6–7, 9–13. But this is exactly backwards. No presumption of constitutionality should apply. A redistricting plan is not like ordinary legislation because the incumbent legislators who enact it face a glaring conflict of interest: they will run for reelection in the very districts they draw and will face an inevitable temptation to manipulate district lines to their advantage. As this Court has long recognized, more "exacting judicial scrutiny" is required when legislation "restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

A. Legislators Are Fiduciaries Who Should Not Use Government Power To Entrench Themselves.

This Court, the Framers of the Constitution, and longstanding political theory all recognize that elected officials, such as legislators, are fiduciaries for the people they represent. This idea of "political trusteeship" has ancient roots, dating back to Plato and Cicero, and was well accepted in England by the time of John Locke, who described the legislative power as "only a fiduciary power to act for certain ends." John Locke, *The Second Treatise of Civil Government* § 149 (J.W. Gough ed. 1946) (1690).[2]

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[2] For accounts of how deeply the fiduciary model of government runs throughout history, see Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101

The Framers thought about government in fiduciary terms, and their intent to impose fiduciary obligations on public officials permeates the constitutional structure. *See generally* Gary Lawson & Guy Seidman, *"A Great Power of Attorney": Understanding the Fiduciary Constitution* (2017); Robert G. Natelson, *The Constitution and the Public Trust*, 52 Buff. L. Rev. 1077 (2004). Indeed, the fiduciary theory of government was nearly universally accepted by proponents and opponents of the Constitution alike during the ratification debates.[3] Natelson, *supra*, at 1086. And this Court

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Calif. L. Rev. 699, 708–09 (2013); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. Rev. 117, 123–25 (2006); Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration From the Reign of Trajan*, 35 U. Rich. L. Rev. 191, 211–32 (2001).

[3] Noah Webster was the lone dissenter from the idea that public officials acted in a fiduciary capacity. *See* Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 Tex. Rev. L. & Pol. 239, 245 n.18 (2007). As James Madison explained in *The Federalist No. 46*, "The federal and State governments are in fact but different agents and trustees of the people." Similarly, several state constitutions at the time of the Framing explicitly recognized that the delegation of power from the people to government officials imposed fiduciary obligations on those officials. *E.g.*, Pa. Const. of 1776, art. IV ("[A]ll power [is] . . . derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them."); Va. Const. of 1776, § 2 ("That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them."); Md. Const. of 1776, art. IV ("That all persons invested with the legislative or

recognized in *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666-67 (2013), that elected state officials are "agents of the people" and owe them "a fiduciary obligation."

Like private-law fiduciaries, legislators bear a duty of loyalty to those they represent. Thus they cannot put their own interests ahead of the interests of the people they represent. That is, after all, what it means to be a fiduciary. Legislators breach their duty of loyalty when they manipulate the machinery of democracy to entrench themselves in power and frustrate potential challengers. *See* D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671, 713–19 (2013).

B. Conflicted Fiduciaries—Not Challengers—Bear The Burden Of Showing That Their Actions Are Fair.

Although one of the hallmarks of a fiduciary relationship is the discretion placed in the fiduciary's hands, the law does not trust fiduciaries to exercise that discretion unsupervised when their own interests are at stake. Thus, as a general rule, fiduciaries must avoid conflicts of interest where possible. So long as they do, courts will not ordinarily second-guess the discretionary judgments of the fiduciary. *See, e.g.*, D. Theodore Rave, *Institutional Competence in Fiduciary Government*, *in Research Handbook on Fiduciary Law* 5-6 (Andrew

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executive powers of government are the trustees of the public . . . ."); *see also* Natelson, *Public Trust*, *supra* at 1134–36.

S. Gold & D. Gordon Smith eds. forthcoming 2017), *available at* https://ssrn.com/abstract=2811302.

But when a fiduciary acts in the face of a conflict of interest, ordinarily deferential courts apply a much more demanding level of scrutiny to the fiduciary's actions. *See id.* at 7. And the burden to show that the self-dealing action was, in fact, fair and in the best interests of the people the fiduciary represents falls squarely on the *fiduciary*, not the challengers. *See, e.g., Lewis v. S. L. & E., Inc.*, 629 F.2d 764, 768–69 (2d Cir. 1980). In other words, when a fiduciary's own interests are at stake, a reviewing court cannot start with the presumption that the fiduciary's actions are legitimate.

Although it has not used fiduciary language, this Court has long recognized that the ordinary presumption that state legislation is constitutional does not apply to legislation that manipulates the very process by which legislators are elected. *See Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 628 (1969) ("The presumption of constitutionality . . . [is] based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality."). This is because we cannot trust conflicted incumbent legislators when their own interests are at stake, nor can we count on the political process to correct their self-dealing. *See Baker v. Carr*, 369 U.S. 186, 258–59 (1962) (Clark, J., concurring) (finding judicial intervention necessary where an "informed, civically

militant electorate" could not force incumbents who benefitted from malapportionment to draw new districts). "More exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment" is thus required. *Carolene Prods.*, 304 U.S. at 152–53 n.4.

Appellants' *amici* accuse the district court of improperly placing the burden of justifying the districts drawn on the incumbent legislators. State of Texas et al. Amici Br. 14. That is not what the district court understood itself to be doing. The district court held that, assuming the burden was on the plaintiffs, they had satisfied it. *Whitford v. Gill*, 218 F. Supp. 3d 837, 911 (W.D. Wis. 2016). But the court would have been entirely justified in placing the burden on the fiduciary legislators. Their conflict of interest in drawing their own districts should render any presumption of constitutionality inappropriate. Indeed, it is a reason for the Court to apply heightened scrutiny.[4]

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[4] *Miller v. Johnson*, 515 U.S. 900 (1995), is not to the contrary. There the Court held that the "presumption of good faith that must be accorded to legislative enactments," evaporated and strict scrutiny applied once the plaintiffs had shown that racial considerations predominated. *Id.* at 916–20. Here, Appellees have easily shown that partisan considerations predominated, which comes as no surprise given the conflict of interest the incumbent legislators faced.

C. Appellants Have Not Shown That The Districts Here Are Fair.

Appellants here have not fulfilled their fiduciary obligation to put the interests of those they represent ahead of their own. In drawing the very districts in which they would run, the incumbent Wisconsin legislators who controlled the process faced a glaring conflict of interest. They made no effort to avoid the conflict or adopt some process that might cleanse the taint of their self-dealing. Instead they hired consultants to help them maximize their own political advantage. *Id.* at 847, 890–96.

As the district court found, Appellants acted with the intent to entrench themselves in power, benefit their political allies, and frustrate potential challengers. *Id.* at 843, 898. And the districts they drew had that effect. *Id.* at 898, 910. This is more than enough to make out a constitutional violation, as Appellees and their *amici* have shown.

II. Recognizing The Justiciability Of Political Gerrymandering Claims And Affirming Here Will Not Require Courts To Review All Redistricting Decisions.

Appellants and their *amici* argue that recognizing the justiciability of political gerrymandering claims and affirming the district court here will require massive intervention by the federal courts in practically all state redistricting. *See, e.g.*, Appellant Br. at 2–3; State of Texas et al. Amici Br. 14–15; N.Y. State Senate Amicus Br. 19; Wisconsin Institute for Law & Liberty Amicus Br. 14. This need not be the case. And it is not a reason to

declare political gerrymandering a nonjusticiable political question. The Court can create incentives for state legislatures to adopt independent processes for redistricting decisions. And reviewing courts can defer to the redistricting decisions of sufficiently independent bodies, keeping self-dealing incumbents from manipulating district lines and courts from needing to second-guess every redistricting decision.

A. Courts Can Create Incentives For Legislatures To Adopt Independent Redistricting Processes By Following Corporate Law's Example.

In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), several members of this Court raised legitimate questions about the federal courts' institutional competence to review redistricting decisions. There is no doubt that redistricting involves inherently political judgments. But the courts' apprehension about their competence to handle political issues is not a reason to declare political gerrymandering claims nonjusticiable and give a green light to incumbent manipulation. Instead the Court can look to the strategies that courts have developed in other areas of law to get around their questionable competence to police fiduciary self-dealing. *See* Rave, *Institutional Competence*, *supra* at 5.

The same problem arises in corporate law. Courts are no better suited to make business judgments than political ones, but they still manage to police self-dealing by corporate directors. Corporate law gets around courts' limited competence with business matters by adopting a two-track

system of judicial review. When shareholders challenge a conflicted director's self-dealing transaction, the reviewing court will closely scrutinize the transaction for "entire fairness," inquiring into the substance of the deal and the fairness of the bargaining process. *See, e.g.*, *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710–11 (Del. 1983). Supervision by a court of limited competence looks comparatively attractive when the alternative is leaving the decision in the hands of a conflicted fiduciary. But to take some pressure off the reviewing court, corporate law provides safe harbors that can cleanse the taint of self-dealing if the transaction is approved by an independent decisionmaker. Thus, if a majority of the disinterested directors or disinterested shareholders approve the interested-director transaction, the reviewing court will apply the much more deferential "business judgment rule" standard. *See, e.g.*, Del. Code Ann. tit 8, § 144(a)(1)–(2); *Benihana of Tokyo Inc. v. Benihana Inc.*, 906 A.2d 114, 120 (Del. 2006).

By adopting this two-track standard of review, corporate law channels corporate decisions about conflicted transactions into independent processes to which courts can safely defer. This allows reviewing courts to shift their focus from the substantive fairness of the outcome to the adequacy and independence of the process used to approve it—a role that courts are institutionally much better suited to play. Rave, *Politicians as Fiduciaries*, *supra* at 703–06.

The Court can make a similar move here. Redistricting decisions made by conflicted state

legislators should be subject to skeptical judicial review. *See id.* 725–28; Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 641–43 (2002). But by creating a safe harbor for redistricting decisions made through independent processes, the Court can provide a powerful incentive for state legislatures to create independent institutions to make redistricting decisions in the first instance. Rave, *Politicians as Fiduciaries*, *supra* at 723–24. The federal courts will thus not be forced to review the substantive political fairness of almost every redistricting decision as Appellants claim. Instead, the courts can defer to substantive political judgments of custom-designed independent redistricting institutions and focus their review on ensuring that these alternative line-drawers are not themselves conflicted or captured by conflicted legislators and that they are provided with sufficient information and resources to make intelligent and independent decisions on where to draw district lines. *Id.* 728–29.

The district court implicitly recognized a safe harbor for districts drawn by independent bodies in its discriminatory intent requirement. *Whitford v. Gill*, 218 F. Supp. 3d 837, 908 (W.D. Wisc. 2016) ("[I]f a claim of partisan gerrymandering is brought against a court- or commission-drawn district plan with a high [efficiency gap], it will stall when the plaintiffs attempt to make the necessary showing of discriminatory intent."). This Court should make the safe harbor explicit.

There is no need, however, for the Court to specify at this time the precise form that independent

redistricting institutions must take to justify deference. States should be free to experiment with different models. The Court need only direct the lower courts to review these institutions to ensure that they are sufficiently independent from conflicted incumbents to cleanse the taint of self-dealing. Following the corporate law model thus keeps reviewing courts focused on process, not politics. Rave, *Politicians as Fiduciaries*, *supra* at 728–29.

B. Courts Can Defer To Districts Drawn Through Independent Processes.

This approach is workable in practice. Of course, not all alternative redistricting processes are created equal—a partisan redistricting commission handpicked by the incumbent legislators would do little to cleanse the taint of self-dealing—and courts will still have to play a role in policing these processes for capture by insiders. But the point is not to take the politics out of inherently political decisions. The point is simply to shift the locus of redistricting decisions away from the *most* conflicted agents—the incumbents who will run for reelection in those districts. Rave, *Institutional Competence*, *supra* at 14.

Successful independent redistricting commissions will likely need to build in roles for partisans on both sides of the aisle and create opportunities for various interest groups to offer input. *See* Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L.J. 1808, 1841–43 (2012). But in order to cleanse the taint of self-dealing, they will need to provide a layer of insulation from conflicted

incumbents both in how the commissioners are selected and how the commissions operate. Partisans, lobbyists, interest groups, and other political intermediaries will inevitably struggle and bargain for influence and power in whatever alternative process is set up. But once the reviewing court has determined that the process is fair and independent, it can defer to the substantive outcome of these pluralist clashes and compromises. Rave, *Politicians as Fiduciaries*, *supra* at 733–35.

Independent redistricting commissions have been successful in some states, including Arizona and California, and reviewing courts have given the districts they produce great deference. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 685–89 (Ariz. 2009) (scrutinizing whether independent redistricting commission followed mandated procedures, but deferring to substantive outcome); *Vandermost v. Bowen*, 269 P.3d 446, 484 (Cal. 2012) (after rejecting a legal challenge against districts drawn by independent redistricting commission, holding that if a referendum to override the commission qualified for the ballot, the commission-drawn districts, which were the product of "an open, transparent and nonpartisan redistricting process," would be used on an interim basis instead of district drawn by the legislature).

Indeed, this Court has, at least implicitly, recognized that independent redistricting commissions are entitled to more deference than conflicted legislatures. In *Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct.

1301, 1305 (2016), the Court rejected a one-person-one vote challenge to state legislative districts drawn by an independent redistricting commission. The Court deferred to the commission's decision to deviate from perfect population equality, even though the district court had found that "partisanship played some role." *Id.* at 1306. By contrast in *Cox v. Larios*, 542 U.S. 947 (2004), the Court showed far less deference when a conflicted legislature made similar deviations from perfect population equality for partisan reasons, and summarily affirmed the lower court's judgment that the districts violated the Fourteenth Amendment. *See also* Cain, *supra* at 1842–43 ("The courts might consider a higher level of deference to redistricting institutions such as independent citizen commissions that are more likely to adopt reasonably imperfect plans.").

When incumbent state legislators draw their own districts, as in this case, the federal courts should be inherently suspicious and apply searching review. But when redistricting decisions are made through independent processes, the taint of self-dealing is cleansed and courts should apply a more deferential standard of review as this Court did in *Harris*. This two-track system of judicial review is a workable model that creates incentives for state legislatures to adopt independent processes for redistricting to which courts can defer. It keeps conflicted legislators out of the business of manipulating district lines to their own advantage and courts out of the business of second-guessing political judgments.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

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